Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

Petition For A Writ Of Certiorari
To The District Court of Appeal, Second District, State of Florida

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there has been a denial of the fundamental constitutional right to be heard under the Fourteenth Amendment of the United States Constitution as a result of the District Court of Appeal, Second District, State of Florida, denying the Petitioner the right to a trial of well-pled contract claims which have never been decided by a trier of fact and never appealed and therefore have never been decided by the District Court of Appeal, Second District?

2. Whether there has been a denial of the fundamental constitutional right to the access of courts under the Fourteenth Amendment of the United States Constitution as a result of the District Court of Appeal, Second District, State of Florida, denying the Petitioner the right to a trial of well-pled contract claims which have never been decided by a trier of fact and never appealed and therefore have never been decided by the District Court of Appeal, Second District?

LIST OF PARTIES

The parties are: Petitioner, Pinellas County, who was the plaintiff in the state trial court and appellant on review before the state appellate court; CH2M Hill, the engineer, who was the defendant in the state trial court and appellee on review before the state appellate court. Another party named in the caption of the state court proceedings is Madison Management Group, Inc. (hereinafter referred to as "Madison") who was the successor to Clevepak Corporation which was the successor to Interpace Corporation (hereinafter referred to as "Interpace"). On November 8, 1991, Madison filed for protection under Chapter 11 of the Federal Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, Case No. 91 B 23969. Therefore, Madison is not a party to these proceedings.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Pinellas County, respectfully requests that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second District, State of Florida, entered on February 2, 1994, and the Order by the same court denying Petitioner's Motion for Rehearing and Rehearing En Banc entered on March 24, 1994.

OPINIONS BELOW

The February 2, 1994 opinion of the District Court of Appeal, Second District, State of Florida, and the Denial of the Motion for Rehearing and Rehearing En Banc entered on March 24, 1994 are the decisions herein sought to be reviewed which are unreported. The decisions are reprinted in the separate

Appendix to the Petition. (A:A,C) The prior judgment of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, Circuit Civil No. 92-4387-CI-13,and the Order Denying Motion for Rehearing by the same court are also unreported decisions that have been reprinted in the separate Appendix to this Petition and technically should also be reversed. (A:D,F)

JURISDICTION

The District Court of Appeal, Second District, State of Florida, entered its decision on February 2, 1994. (A:A) Thereafter, Petitioner filed a Motion for Rehearing and Rehearing En Banc with the District Court of Appeal, Second District which was denied on March 24, 1994. (A:B,C) Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves section one of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The original suit was brought by Petitioner, Pinellas County (hereinafter referred to as "Pinellas"), for a defectively

manufactured and engineered 13.5 mile water distribution pipeline. The suit was brought on the legal theories of breach of contract and negligence. This pipeline, which is also commonly referred to as the Transmission Main, is 60-inches in diameter. It is the very heart of the water system of Pinellas. Respondent, CH2M Hill Southeast, Inc., successor to Black, Crow & Eidness, Inc. (hereinafter referred to as "Hill"), was the design engineer with monitoring responsibilities for the Transmission Main. The pipe is described as "prestressed concrete pipe" and was manufactured by Interpace. Later Interpace changed its name to Madison Management Group, Inc., and then merged with Clevepak Corp.

I. Contractual Relationship Between Parties.

In 1975, Pinellas and Hill entered into an Engineering Consulting Agreement in which Hill was to provide in pertinent part for: the preparation of a complete basis for the design of the 60-inch diameter Transmission Main; consultation and advice as to the laboratory testing and inspection of samples or materials; preparation and furnishing of all necessary contracts, specifications, schedules of quantities and estimates of costs; the visitation of the pipe manufacturing construction site on an average basis of four (4) visits per month in order to protect Pinellas against defects and deficiencies in the work of the manufacturer; the approval of shop drawings; the judging of the manufacturing performance in making prestressed pipe according to specifications; and the recommendation of final acceptance of the pipeline that it had been produced according to the plans and specifications after its completion. (A:H:17-32)

Hill, as engineer, prepared the plans and specifications, bid documents, and contracts for the pipeline in 1976. Since Interpace was the successful bidder, Hill drafted the contract between Interpace and Pinellas. Hill was given the right to inspect the manufacturing process and component materials used in pipe manufacture. Interpace was required to furnish at

its expense to Hill all reasonable facilities, labor and materials deemed necessary by Hill for conducting such inspections. No tests on steel or concrete were ever submitted by Interpace pursuant to Section 1.9 of AWWA C-301-72, which were the standards under which the pipe was to be manufactured. Hill did not require submittal to Hill of tests on the wire or concrete as the overseeing and consulting engineer.

II. History And Performance Of Pipeline.

The pipeline was manufactured and installed between March of 1977 and October of 1978. On October 2, 1978, the pipeline was placed into service. (A:H:5-6) On November 13, 1979, a section of the 60-inch pipe exploded creating a giant hole in the pipeline and threatening destruction of a large condominium. (A:H:6) The burst pipe caused Pinellas to embark upon an extensive investigation to determine the cause for the failure and the condition of the entire line. (A:H:6-7) On November 1, 1983, Pinellas determined that not only were the two pipe failures caused by improper manufacturing, materials and techniques, but that the *entire pipeline* was defective and should be replaced. (A:H:6-7)

The transmission line, which is the subject of this litigation in state court, is so critical to the adequate supply of water to Pinellas that the line cannot be taken out of service except under extreme emergencies and then for only a very short period of time. Hill knew the critical nature of the line and that the pipeline had to be constructed without material defects in the pipe. (A:H:4) The representations made to Pinellas were that the prestressed pipe would last well over one hundred years. Despite these representations, Pinellas experienced its first pipe rupture shortly after the line had been completed. (A:6)

III. Summary Of Well Pled Breach Of Contract Allegations.

On or about October 30, 1983, Pinellas filed the original

action against Hill and Interpace, along with other defendants. The original complaint included multiple breach of contract allegations against Hill. (A:H:16) Consequently, Pinellas filed an amended complaint, based on the additional information obtained from its further investigation of the pipeline. (A:M) Hill filed objections to the filing of the amended complaint and a motion to strike allegations. (A:K,N) The trial court denied the motion and objections filed by Hill. (A:L,O)

The First Amended Complaint alleged the following breaches of contract against Hill:

1. Hill was responsible for duties imposed by the manufacturing contract with Pinellas;
2. Hill had a duty to inspect the manufacturing of the pipe;
3. Hill breached the Engineering Consulting Agreement ("contract") by allowing use of Class IV wire in the manufacturing of the pipe;
4. Hill breached the contract by failing to direct properly, to perform or to have performed soil survey investigations including, soil resistance to the flow of electric current, total soil acidity, soil drainage (groundwater fluctuations), soil texture, soil microbial activity and soil chemistry;
5. Hill breached the contract by failing to direct properly, to perform or to have performed corrosion testing to determine effects of local soil corrosion conditions on the rate of corrosion of prestressed steel wire embedded in mortar;
6. Hill breached the contract by failing to direct properly, to perform or to have performed investigations of the pipeline route for stray electrical currents, low soil resistivities and aggressive soil and ground water conditions;
7. Hill breached the contract by allowing specifications that did not require the wire to the ductile;
8. Hill breached the contract by approving pipe designs with inadequate safety factors;
9. Hill breached the contract by failing to review design calculations for the individual sections of the pipe;

10. Hill breached the contract by allowing the manufacturer to specify ASTMA-648-73, which is not recognized nor sanctioned in AWWA-C-301-72;

11. Hill breached the contract by approving the use of 17-gauge cylinder steel instead of the specified 16-gauge cylinder steel;

12. Hill breached the contract by specifying only absolute minimum standards and specifications, thereby permitting defective pipe to be made;

13. Hill breached the contract by failing to review all project documents submitted to Pinellas by the manufacturer;

14. Hill breached the contract by failing to specify or to have performed sufficient inspection and testing of materials used in the manufacture of the pipe to ensure the pipe would be manufactured and delivered as required by the specifications;

15. Hill beached the contract by failing to inquire of the manufacturer concerning the use of admixtures that were used in the manufacture of the pipe;

16. Hill breached the contract by having no knowledge of the use of admixtures and failed to inspect the use of admixtures;

17. Hill breached the contract by failing to require the manufacturer to perform any additional tests not specifically mentioned in the standards and specifications, but necessary to ensure the quality and the safety of the manufactured pipe;

18. Hill breached the contract by failing to require that test results of the manufacturer and affidavits or certifications of compliance by the manufacturer be supplied for review;

19. Hill breached the contract by certifying completion of the project without receiving affidavits and certifications of compliance;

20. Hill breached the contract by failing to specify acceptance inspection procedures adequate to identify defective pipe;

21. Hill breached the contract by failing to inspect the work properly;

22. Hill breached the contract by failing to identify incorrect pipe loading and unloading techniques;

23. Hill breached the contract by failing to require the manufacturer to provide samples and specimens of pipe manufactured materials as provided for in the standards and specifications;

24. Hill breached the contract by failing to examine and test materials, samples and specimens;

25. Hill breached the contract by failing to require the manufacturer to provide an affidavit and certifications of compliance at the end of the project;

26. Hill breached the contract by failing to require proper repairs to pipe damaged during transportation or installation;

27. Hill breached the contract by failing to detect that the pipe coating material was mortar rather than concrete as required in the specification;

28. Hill breached the contract in failing in designing the system to provide for sufficient flexibility which would allow Pinellas to operate the pipeline as working pressures up to 150psi;

29. Hill breached the contract by failing to design the system to include a sufficient surge pressure margin or surge protection facilities adequate for the surges which the pipeline will be subjected;

30. Hill breached the contract by failing to design the surge protection facilities properly which were provided, specifically, defective air and vacuum-valve assemblies;

31. Hill breached the contract by failing to take into consideration and to design to prevent the probability that surges would be induced in the pipeline through the operation and the interaction between the Cypress Creek pump station, SK Keller Pump Station, and North Booster station;

32. Hill breached the contract by failing to forewarn Pinellas that the operation or modification of pumps, motors, drives, valves, actuators, and other appurtenances in the pump stations, when acting individually or together, could result in damaging surges being introduced into the pipeline;

33. Hill breached the contract by failing to design, recom-

mend, or advise as to the need for instrumentation to monitor for surges which could damage the pipeline and which could be produced by the operation and interaction between the three pump stations;

34. Hill breached the contract by failing to draft a requirement in the contract between Pinellas and the manufacturer that the manufacturer provide all test results as required to be performed under AWWA-C-301-72;

35. Hill breached the contract by failing to require in the contract between Pinellas and the manufacturer an affidavit and certification of compliance as provided for in AWWA-C-301-72;

36. Hill breached the contract by failing to provide provisions in the contract between Pinellas and the manufacturer that would give a sufficient warranty;

37. Hill breached the contract by failing to provide in the contract between Pinellas and the manufacturer a proper protection clause and recourse against the manufacturer in the event a defective product was supplied;

38. Hill breached the contract by failing to inform Pinellas of its knowledge and understanding that the pipeline would only be expected to last approximately 50 years while the manufacturer consistently maintained that the pipeline would last either indefinitely or at least 100 years;

39. Hill breached the contract by failing to exercise due care in reviewing submittals from the manufacturer which described the prestressed concrete pipe the manufacturer intended to manufacture;

40. Hill breached the contract by allowing the manufacturer to manufacture a lesser quality pipe than was called for in the specifications;

41. Hill breached the contract by failing to reject shop drawings submitted by the pipe manufacturer which included the specification of ASTMA-648-73 which allegedly permitted the manufacturer to use Class IV wire;

42. Hill breached the contract by failing to require the manu-

facturer to meet the requirements of the contract specifications and of Section 1.9 of AWWA-C-301-72, requiring the provision of wire test specimens and other steel test specimens to the purchaser or its agent.
(A:M)

IV. History Of The Trial Court Action.

During the trial, Hill again filed motions for directed verdict and dismissal of claims contained in the breach of contract count against Hill. On September 26, 1989, the trial court denied the motions. (A:P) Having been unsuccessful in dismissing the action, Hill then attempted to attack the trial judge. Following eight (8) months of trial, Hill filed a Motion for Disqualification of the trial judge based on an alleged fear that the trial judge was prejudiced and biased against Hill. Interpace joined the Motion. The trial court denied the Motions for Disqualification on October 17, 1989 finding the motions "legally insufficient". (A:Q) At the time that Hill and Interpace had filed their Motions to Disqualify, there had already been thousands of pages of testimony taken from numerous witnesses. (A:Q:1-2) Thereafter, Hill and Interpace filed Petitions for Writ of Prohibition with the District Court of Appeal, Second District, (hereafter the "District Court"). The District Court no doubt reviewed Hill's accusations very closely. Yet, even under close scrutiny, on October 27, 1989, the District Court *denied* both Interpace's and Hill's Petition for Writ of Prohibition. (A:R,S) Hill filed a Motion for Rehearing and Rehearing En Banc, which was also denied. (A:U)

Shortly thereafter, Hill filed its *second* Motion for Disqualification of the Trial Judge, which was *denied* by the trial court orally on November 6, 1989. Hill then filed its *second* Petition for Writ of Prohibition with the District Court, which was again *denied* on March 8, 1990. (A:T) Hill filed a Motion for Rehearing which was also denied. (A:U) These denials were res judicata of the issue of disqualification raised by Hill in the

subsequent appeal from Final Judgment. *See Nordqvist v. Nordqvist*, 586 So.2d 1282 (Fla. 3d DCA 1991) *citing Reyes v. State*, 554 So.2d 625 (Fla. 3d DCA 1989), *rev. denied*, 562 So.2d 346 (Fla. 1990); *Freeman v. State*, 554 So.2d 621 (Fla. 3d DCA 1989), *rev. denied*, 562 So.2d 345 (Fla. 1990); *Valsecchi v. Proprietors Ins. Co.*, 502 So.2d 1310 (Fla. 3d DCA 1987); *Florida Audubon Soc'y v. Ratner*, 497 So.2d 672 (Fla. 3d DCA 1986), *rev. denied*, 508 So.2d 15 (Fla. 1987).

Consequently, the parties returned for another five (5) months of trial. A judgment was entered by the trial court in favor of Pinellas. The lower court found for Pinellas on all of the breach of contract and negligence claims against Hill. (A:V:10) Following Final Judgment, Hill, and Interpace appealed.

V. History Of The First Appellate Action.

The following issues were raised by Hill on the first appeal: trial judge should have disqualified himself; trial judge erred as a matter of law imposing tort liability on Hill; trial court erred as a matter of law in finding Hill liable for breach of contract based on defects in the pipe segments manufactured by the manufacturer and as a result of the manufacturer's use of class IV (a hybrid and unsanctioned wire outside any national standard) wire in all the pipe segments; trial court's determination that Pinellas' contract with Interpace "merged" with the Hill contract so as to impose additional contractual duties on Hill was legally unsustainable; and award of damages was not sustainable by law or by evidence. (A:W:4-5)

The main focus of Hill's appeal was directed to the issue of disqualification of the trial judge. This issue should not have been given any credence by the District Court in light of the fact that the District Court had already addressed the issue of disqualification pursuant to the three separate Petitions for Writ of Prohibition which were denied. (A:R,S,T) Ultimately, the District Court resolved certain trial issues as a matter of law

and made four important rulings: the trial judge had to be recused; Pinellas could not bring a negligent action against Hill; the contract between Pinellas and Hill on the one hand and Pinellas and Interpace, on the other hand, to which Hill was not a signature — could not be merged so as to impose additional powers and *duties* designated and assumed by Hill as project engineer; Hill's contract imposed no duties on Hill to physically oversee the pipe manufacturing process. *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85, 88-89, (Fla. 2d DCA 1992), *rev. denied*, 613 So.2d 7 (Fla. 1992). (A:G) The District Court disposed of these questions and remanded for a new trial on the sole issue before the appellate court which Hill appealed and which could not be resolved as a matter of law, namely whether Hill breached its contract by permitting the use of Class IV wire on Pinellas' pipeline. The remand of the action was inappropriate because under the controlling law in Florida the disqualification of the trial judge had the affect of rendering void the entire trial. For all practical purposes the trial never happened. *See Bolt v. Smith*, 594 So.2d 864 (Fla. 5th DCA 1992); *Whack v. Seminole Memorial Hosp., Inc.*, 456 So.2d 561 (Fla. 5th DCA 1984).

VI. Remand Of Action To New Trial Judge.

Following the remand, a new trial judge was appointed. At a hearing on March 3, 1993, the lower court had asked the parties to present their views on the issues that remained to be tried. Pinellas contended that in addition to the Class IV wire issue, multiple other breach of contract issues that had been initially plead and found to state a cause of action should be retried. Hill argued that the retrial was exclusively limited to the breach of contract wire issue. The decision does not say that the remaining contractual issues not raised in the appeal were abrogated. *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla. 2d DCA 1992), *rev. den.* 613 So.2d 7 (Fla. 1992). (A:G) The trial court erroneously accepted Hill's argument and entered a Final Partial Judgment limiting the retrial to the Class IV wire issue. (A:D)

VII. Constitutional Issues Raised Before The Trial Court.

Pinellas having been denied the right to try its well pled breach of contract issues before the trial court, without ever being provided any opportunity to be heard, immediately filed a Motion for Rehearing. (A:E:2-3) Pinellas alleged that the Partial Final Judgment by the trial court violated Pinellas' due process rights guaranteed by the United States Constitution, in that Pinellas was denied the opportunity to be heard on the well pled breach of contract allegations that were never addressed by the District Court. (A:E:2) Additionally, Pinellas alleged that the Partial Final Judgment resulted in the denial of the fundamental constitutional right of the access to the courts, by denying it the right to proceed in the state trial court with its breach of contract claims. (A:E:2-3) On March 25, 1993, *without hearing*, the lower court entered a judgment denying Pinellas' Motion for Rehearing. (A:F)

VIII. History Of Second Appellate Action Which Is Now The Subject Of This Petition.

Pinellas filed an Appeal with the District Court on April 1, 1993. In its Initial Brief, Pinellas argued that if Hill's legal position was correct, Pinellas would be foreclosed from prosecuting multiple breach of contract claims without the trial court ever disposing of the claims on the merits. (A:Z:15-38) Such a result offends the notion of due process under the Federal Constitution. Pinellas sought the *opportunity* to be heard on these questions which had never been addressed. (A:Z:37-38) Pinellas asserts that when it tried this action before the trial judge, it had offered proof of these breaches of contract itemized on pages 5 through 8 of this Petition. Many of these proofs went unchallenged during the first trial, and taken together constituted a massive breakdown by Hill in the performance of the Engineering Consulting Agreement. When the first appeal was taken, the District Court, for one reason or another, decided that

it would not follow its own earlier decisions denying three Writs of Prohibition. The District Court reversed and remanded the case for a second trial, determining that the trial judge should step down. *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla. 2d DCA 1992), *rev. denied*, 613 So.2d 7 (Fla. 1992). (A:G) The remand was for a new trial on the only fact issue which Hill had appealed. However, it is clear from the District Court's decision that it was neither considered nor did it pass upon a host of other asserted contract breaches by Hill. (A:W,Y) The decision does *not* specifically dispose of these other breaches of contract never raised in the first appeal. (A:W,X,Y)

The law of the case doctrine is clear that any issue not appealed and therefore not decided is proper for retrial after remand. *See Two M Development Corp. v. Mikos*, 578 So.2d 829 (Fla. 2d DCA 1991); *Bakker v. First Federal Savings and Loan Association of Hammonton, New Jersey*, 575 So.2d 222 (Fla. 3d DCA 1991); *Marine Midland Bank Central v. Cote*, 384 So.2d 658 (Fla. 5th DCA 1980); *Tri Par Land Development Corp. v. Henthorn*, 241 So.2d 429 (Fla. 2d DCA 1970); *Sax Enterprises, Inc. v. David and Dash, Inc.*, 107 So.2d 612 (Fla. 1958). *See also, Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert.den.*, 459 U.S. 1226 (1983); *Holcomb v. United States*, 622 F.2d 937, 940 (7th Cir. 1980). To have the District Court now rule that Pinellas could not be heard on the remaining alleged breaches of contract is to deny Pinellas its day in court, violating the fundamental constitutional right to the access of courts and right to be heard.

In its Answer Brief, Hill responded to the constitutional right of access to the courts and opportunity to be heard contending that Pinellas was given an opportunity to be heard. (A:AA:3) However, what Hill failed to acknowledge is that Pinellas *never* was given any forum in which to address the validity of the contract claims that were summarily eliminated. Hill certainly cannot contend that all the breaches of contract were addressed in its Initial Brief. Such a contention is unsupported by Hill's brief. (A:W)

Hill also moved the District Court to assign the same panel of judges who heard argument in the prior appeal between the same parties. The first appeal was heard by Chief Judge Danahay and Judges Campbell and Frank. On September 20, 1993, the Second District Court *denied* Hill's Motion for the same panel. Yet, when oral argument was heard by the District Court, the panel consisted of *two* of the three original judges. Judge Danahay and Chief Judge Frank, along with Judge Schoonover sat on the second panel. On February 2, 1994, the District Court filed its Opinion, stating: "Per curiam. Affirmed. *See CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85 (Fla. 2d DCA 1992), *rev. denied*, 613 So.2d 7 (Fla. 1992)." (A:A) It is evident that the District Court chose to *completely* ignore the federal constitutional issues. Pinellas filed a Motion for Rehearing and Rehearing En Banc on February 16, 1994 alleging that it "...has *never* had its day in court concerning its well-pled breach of contract claims which constituted a denial of due process of law." (A:B:2-3) The Motion for Rehearing was denied on March 24, 1994. (A:C)

IX. Jurisdiction Properly Lies With This Court.

28 U.S.C. §1257 permits this Court to review final judgments or decrees rendered by the highest court of a state "...where any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of or any commission held or authority exercised under, the United States." Pinellas' fundamental right of access to the courts and opportunity to be heard on its well pled breaches of contract claims has been foreclosed. This Court has previously held that it will find jurisdiction in a case where federal rights are found to be infringed by a state court decree. *See Diamond National Corporation v. State Board of Equalization*, 425 U.S. 268 (1976). Moreover, a decision "...by the highest court of a state in which a decision could be had..." does not mean that the decision must be rendered by the state court of last resort. Pinellas has a "final" decision from the District Court as required by 28 U.S.C. §1257.

See Nash v. Florida Industrial Commission, 389 U.S. 233 (1967). In *Nash*, this Court held a per curiam decision of a Florida District Court of Appeal was the "highest court" in Florida. 389 U.S. at 364-365. The federal constitutional issues have been continuously raised both in the lower court and at the appellate court level on behalf of Pinellas. (A:B,E, Z:37-38) No principal of Florida law explains outright dismissal of well pled contract claims without an evidentiary hearing. Any attempt to refuse to articulate upon a raised constitutional issue by the state court is deemed to be just as reviewable by this Court as if addressed by an express decision. *See, Street v. New York*, 394 U.S. 576 (1969); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). Pinellas has reached the end of the line in the state judicial system, and so under 28 U.S.C. §1257 this Court has the power to review.

REASONS FOR GRANTING THE WRIT

This case presents stark conflicts not only between this Court's decisions but also other federal court decisions. The scope and importance of the ruling in this case is *enormous*, reaching far beyond the State of Florida. A writ of certiorari should be issued to resolve these conflicts and provide direction for the citizens and courts of this nation. Moreover, the decision below is erroneous and the issues it addresses are of utmost importance. The case involves the water supply to a population in excess of 860,736 people. It is for these reasons that Pinellas requests this Court to grant certiorari and enter an appropriate order *summarily* disposing of the February 2, 1994 opinion of the District Court (A:A) and the Partial Final Judgment entered by the trial court on March 3, 1993, (A:D), under the authority of Rule 16.1, Rules of the Supreme Court of the United States. The decisions are clearly erroneous and are contrary to controlling precedent. To allow for further briefing and argument would be a waste of judicial economy. Specifically, the relief sought is a summary order granting certiorari, vacating the judgment, and remanding with instructions to proceed on the merits of the

breach of contract allegations raised by Pinellas against Hill.

I. Certiorari Should Be Granted To Resolve The Conflict Of Legal Principles Raised By The Opinion Of The District Court, And This Court And Other Federal Court Decisions Which Have Interpreted The Application Of The Right Of Access To The Courts And The Opportunity To Be Heard.

A. Denial of the Opportunity to be Heard on Well Pled Allegations Resulting in a Disposal of the Claims for Breach of Contract.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Citations omitted) *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). In *Armstrong*, this Court examined the procedures implemented by a Texas trial court to allow for the adoption of a child *without* the natural father's written consent. The applicable law of Texas required the written consent of the natural father prior to adoption, *unless* the father failed to substantially contribute to the child's support for two years. The natural mother of the child *had* filed an affidavit with the Texas trial court alleging that the father had failed to substantially contribute to the child's support for more than two years. On the same day that the natural mother filed the affidavit, her second husband filed an adoption petition representing that he wanted to adopt the child.
The adoption petition also alleged that the natural father had not substantially contributed to the child's financial support for over two years. *Armstrong*, 380 U.S. at 546-548.

At no time was the natural father given notice of the affidavit or the adoption proceeding; however, the natural father's residence was known at the time. The trial court being fully apprised of these facts proceeded to enter the adoption decree

without the natural father's consent and without providing the natural father with notice of the proceedings before the Texas trial court. Thereafter, when the natural father learned of the adoption, he filed a motion before the same court requesting the court to annul the adoption decree. Eventually, a hearing was held before the trial court in which the natural father was given the opportunity to show that the decree should be annulled, but the motion was denied. The issue before this Court on certiorari review was whether the natural father was ultimately given a sufficient opportunity to be heard. *Id* at 549-550. This Court held that the failure to give the natural father "...notice of the pending adoption proceedings violated the most rudimentary demands of due process of law." *Id* at 550. Further, the evidentiary hearing provided to the father "after the fact" did not undo the injustice. This Court held that the opportunity to be heard:

> "...must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted". *Id* at 552.

The District Court's opinion is in direct conflict with the legal principals set forth by this Court in *Armstrong*, 380 U.S. 545, along with other federal court decisions which recognize "...the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring).

The Ninth Circuit has reviewed a similar factual scenario involving a decision by the Hawaii Supreme Court in *McBryde*

Sugar Company v. Robinson, 504 P.2d 1330 (Haw. 1973), *rehearing den.*, 517 P.2d 26 (1973). *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985). The original state court action was filed in 1959. The subject of the suit was to seek a determination of waters rights. The original parties each owned parcels of land which gave them rights and interest in the water. *Robinson v. Ariyoshi*, 658 P. 2d 287, 292 (Haw. 1982). The trial court entered a judgment awarding quantities of water pursuant to what it determined to be appropriate under the applicable facts and law. *Id.* The judgment delineated "...the rights of the parties with respect to appurtenant water, (footnote omitted) prescriptive water, (footnote omitted) normal surplus water, (footnote omitted) and storm and freshet surplus water (footnote omitted) in the Hanapepe Valley." *McBryde*, 517 P.2d at 29.

On appeal the parties raised many issues. The Supreme Court of Hawaii basically upheld the findings of the lower court with regard to the amount of appurtenant water which belonged to the State, McBryde, and the Small Owners. *Id.* The Supreme Court of Hawaii affirmed in part and reversed in part the lower court's findings as to the amount of appurtenant water that certain parties were entitled to. Further, the Supreme Court of Hawaii also reversed the lower court's finding that McBryde had title to over two million gallons of water per day by prescriptive use. *Id.* at 30. This would have been all well and good if the Supreme Court of Hawaii had stopped there, but it did not. The Supreme Court of Hawaii then made the following decision:

> "...*sua sponte* overruled all territorial cases to the contrary and adopted the English common law doctrine of ripari an rights. (Citation Omitted)." *Robinson*, 753 F.2d at 1470.

As a result of this radical decision, the parties immediately motioned for rehearing. The Supreme Court of Hawaii granted the rehearing and directed the parties to file briefs. Although the parties were not directed to argue constitutional issues pursuant to the granting of rehearing, such issues were raised by some of

the parties. Certain parties contended that the decision of the Supreme Court of Hawaii was a taking of private property without the opportunity to be heard. *McBryde*, 517 P.2d at 47-51 (Marumoto, J. dissenting). After hearing arguments from the parties, the Supreme Court of Hawaii affirmed its earlier opinion. *Id.* at 27.

Following the unprecedented decision by the Hawaii Supreme Court, the parties to the action filed a complaint in the federal district court. *Robinson v. Ariyoshi*, 441 F.Supp. 559 (D. Haw. 1977), *aff'd. in part, vac'd. in part*, 753 F.2d 1468 (9th Cir. 1985), *vac'd. on other grounds*, 477 U.S. 902 (1986). The plaintiffs alleged that the Hawaii Supreme Court had denied the plaintiffs their substantive and procedural due process rights by proceeding to decide issues that had not been tried by the parties in the state court proceeding. The federal district court found that the decision of the Hawaii Supreme Court did violate due process rights because the parties had not been given the opportunity to argue those issues decided by the Hawaii Supreme Court. *Robinson*, 441 F.Supp. 559. On appeal, the Ninth Circuit specifically held:

> If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction over those claims. *Wood v. Orange County*, 715 F.2d 1543, 1546-47 (11th Cir. 1983) *cert. denied*, ____ U.S. _____, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984). We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation. Like the court in *Wood*, we are concerned that "[s]uch a result might deprive [plaintiffs] of any forum, state or federal, where [they have] a reasonable opportunity to present [their] federal constitutional claims, a result arguably con-

trary to the requirement of due process." *Id.* at 1547. 753 F.2d at 1473, N.2

Similarly, the District Court has denied Pinellas the opportunity to be heard on well-pled breach of contract allegations. The District Court has acted in the same fashion as the Hawaii Supreme Court in *McBryde*, 504 P.2d 1330 (1977). The District Court has foreclosed issues that have never been raised before it, thereby denying the parties an opportunity to be heard. Pinellas has not been given the opportunity to try the well pled breach of contract allegations in any forum. There is no evidence to show that Pinellas has been shuttled off to an alternative dispute resolution to argue its breach of contract claims. Rather, the District Court has unjustifiably closed the courthouse doors to Pinellas.

B. Denial of the Fundamental Constitutionally Protected Right of Access to the Courts.

The constitutional basis for the right of access to the courts is found in the due process clause. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). This Court has further held that the access to courts "...assures that no person will be denied the opportunity to present the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579. The decision of the District Court sub judice hacompletely rejected this Court and other federal court decisions which recognize that there is a fundamental constitutional right to not only be heard but to be allowed the right to access both the federal and state courts. *Hooks v. Wainwright*, 352 F.Supp. 163 (M.D. Fla. 1972).

In *Monroe Division, Litton Business Systems, Inc. v. DeBari*, 562 F.2d 30 (10th Cir. 1977), the plaintiff, Monroe, sued to enforce a provision of its employment contract, which prohibited any employee from competing with Monroe, the employer, for one year after the termination of the contract. The defendant, DeBari, had previously been employed as an assistant branch

manager for Monroe. His contract was terminated on June 27, 1975. Following an evidentiary hearing, the district court issued a preliminary injunction barring DeBari from competing with Monroe or its parent company or any affiliates. However, Monroe was not required to post a bond. Thereafter, DeBari moved the court to enter an order requiring the posting of a bond. Monroe objected to the posting of the bond alleging that the corporation had sufficient funds for security purposes. The court denied the motion holding that it would be inequitable to require the posting of the bond on a preliminary injunction. Ultimately, a trial on the merits was held. The trial court found DeBari had a contract only with Monroe and not with the parent company or other affiliates. A permanent injunction was entered restricting the "non-compete" clause to just Monroe. Following the judgment, DeBari moved the court to enter an order enforcing liability based on the wrongful preliminary injunction and requested to be heard on this issue. The lower court denied DeBari's motion to enforce liability without a hearing. The federal circuit court found that pursuant to the district court's actions, there had been a denial to be heard in a court of law. A party that has properly brought an action before the court is entitled to be heard prior to the court entering an order denying that party's cause of action. 562 F.2d at 33.

The Eleventh Circuit has also specifically held that actions taken by a court can result in a denial of the right to access the courts. *Procup v. Strickland*, 760 F.2d 1107 (11th Cir. 1985). In *Procup*, the district court had originally entered an injunction restricting any further filings of pleadings by a state prisoner. *Procup v. Strickland*, 567 F.Supp. 146 (M.D. Fla. 1983). The Eleventh Circuit, acknowledging the multiple lawsuits filed by Procup, refused to allow the injunction to stand. The Circuit Court of Appeals reversed the lower court's order "[b]ecause the injunction unduly burdens Procup's constitutional right of access to the courts and seeks to absolve the district court of its responsibility to examine prisoners complaints for frivolity or maliciousness on a case-by-case basis..." 760 F.2d at 1109.

Sub judice, the District Court has entered an order that has the same effect as that entered by the federal district courts in both *Procup v. Strickland*, 567 F.Supp. 146 (M.D. Fla. 1983), and *Monroe Division, Litton Business Systems, Inc. v. DeBari*, 562 F.2d 30 (10th Cir. 1977). The District Court has refused Pinellas the opportunity to bring an action for multiple breaches under the Engineering Consulting Agreement (A:H:17-32), thereby unduly denying Pinellas' right of access to the courts. The District Court has attempted to absolve itself and the lower court of what would be a very time-consuming, complex and costly piece of litigation, by limiting the case to the few contract issues brought on appeal by Hill in the first appeal. (A:A) There is no doubt that the second trial will be much more extensive if the multiple contract issues are tried. Yet, there is no excuse for the District Court to enter an irrational and unsupportable opinion which bars Pinellas from bringing causes of action which the state appellate court has never been presented on appeal.

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983), also addressed a private individual's right to bring an action for the denial of the right to access the courts. The Fifth Circuit described the right of access to the courts of this country to be "...basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." *Id.* at 971. Further, the Fifth Circuit explained that "[a] mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be *'adequate, effective,* and *meaningful.' Bounds v. Smith*, 97 S.Ct. at 1495; *see also Rudolph v. Locke*, 594 F.2d at 1078." Id. at 972.

Moreover, in *McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984), the Tenth Circuit expressly stated, relying upon *Ryland*, 708 F.2d 967, 971-72 and *Lamar v. Steele*, 693 F.2d 559, 562 (5th Cir. 1982), *cert. den.* 464 U.S. 821 (1983), that a plaintiff does not necessarily have to show that it was prevented from filing a suit in order to assert a denial of the right of access to a court. 730 F.2d at 1375. This is exactly Pinellas' dilemma. Although, it was originally allowed to file a complaint alleging numerous breach

of contract allegations, those well plead allegations were later stricken away by the District Court without so much as one hearing on the issues or merits.

Lastly, in *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986), the Harrisons filed a federal civil rights action in the federal district court alleging that their constitutional right of access to the courts had been infringed upon by the actions of the City of Springdale and its water and sewer commission. The Harrisons had owned a blueberry farm in Springdale. In 1980, a lift station failed, resulting in raw sewage entering the groundwater and polluting the Harrisons' irrigation water used for the farm. The blueberry crop was destroyed. An investigation by the City of Springdale confirmed that the crop was damaged as a result of the discharged sewage.

The Harrisons originally filed suit in state court seeking damages and injunctive relief from the water and sewer commission. Thereafter, the Harrisons contended that three members of the commission were attempting to force the Harrisons into selling their farm property to the City of Springdale to eliminate their civil suit. Further, the Harrisons claimed that the City threatened to condemn their farm property if the offer to sell was not accepted. The Harrisons declined the offer to sell. A counterclaim was then filed on behalf of the water and sewer commission in the state court action claiming that it had to condemn the Harrisons' farm property out of necessity to be able to resolve the overflow problem. At a hearing before the state court, one of the commissioners admitted that the counterclaim filed against the Harrisons was only done "...as a tactical measure to pressure the Harrisons to settle their damage claim against the Commission." 780 F.2d at 1424. The state trial court dismissed the counterclaim on the ground that there had been no showing of a public purpose for taking.

Following the dismissal of the counterclaim, the Harrisons filed the action in federal court alleging that their constitutional right to the access of court had been infringed by the

commission's attempt to "bully" the Harrisons into voluntarily dismissing the state court action. Specifically, the landowners claimed that their constitutional right of access to the courts had been violated by the City of Springdale and its water and sewer commission, who allegedly conspired to force the Harrisons into a settlement of their pending state action. The Eighth Circuit acknowledged that the facts of *Harrison* presented a somewhat novel twist to the constitutional right to access the courts. It certainly did not fall into the category of "prisoner's rights". Yet, the court found that the constitutional right was clearly defined. "An individual is entitled to 'free and unhampered access to the courts." *United States ex rel. Cleggett v. Pate*, 229 F.Supp. 818, 821-22 (N.D. Ill. 1964)." 780 F.2d at 1427. The circuit court held that Harrisons' stated a cause of action for infringement of their constitutional right to access to the courts. 780 F.2d at 1425.

Sub judice, the District Court's recent decision (A:A), is clearly a denial of Pinellas' constitutional right to access the courts. Hill elected to raise only select contractual issues for appellate review following the entry of the Final Judgment in favor of Pinellas. (A:V,W) Absent from the contractual issues are numerous well-pled breach of contract allegations. Yet, when Pinellas attempted to raise these contract allegations after the first appeal, the lower court refused to hear further argument or evidence on the contract actions. The District Court affirmed the lower court's decision denying Pinellas its day in court. (A:A) Now that the first trial has been nullified, Pinellas is entitled to a trial on those issues which no trial judge or jury have decided and which the District Court never considered. The doctrine of the law of the case mandates a retrial of those issues not appealed and not decided. In *Two M Development Corp.*, 578 So.2d at 830-831, the court held that the law of the case applies to only those issues that were actually considered and decided on the former appeal involving the same action. *Accord, Greene v. Massey*, 384 So.2d 24 (Fla. 1980); *Barry Hinnant, Inc. v. Spottswood*, 481 So.2d 80 (Fla. 1st DCA 1986); *Tri Par Land Development Corp. v. Henthorn*, 241 So.2d 429 (Fla. 2d DCA 1970); *Goodman v. Oslen*,

365 So.2d 393 (Fla. 3d DCA 1978). The federal courts are in agreement with Florida courts holding that the law of the case doctrine only applies to those issues the appellate court addressed. *See also, Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert.den.*, 459 U.S. 1226 (1983); *Holcomb v. United States*, 622 F.2d 937, 940 (7th Cir. 1980).

When the District Court determined that the trial judge should be recused, the final judgment was necessarily vacated and a new trial required. Following the disqualification of the trial judge, the parties were returned to the same position they had occupied immediately prior to the commencement of the first trial. Under law, for all practical purposes, no trial ever occurred. *See Bolt v. Smith*, 594 So.2d 864 (Fla. 5th DCA 1992); *Whack v. Seminole Memorial Hosp. Inc.*, 456 So.2d 561 (Fla. 5th DCA 1984). Therefore, all of the properly plead issues should have been available to litigate upon retrial.

II. The Issues Presented Herein Are Of Fundamental Importance.

The right of the access to courts and the opportunity to be heard is an indispensable right guaranteed by the Constitution. In *Chambers v. Baltimore and Ohio Railroad Co.*, 207 U.S. 142 (1907), this Court characterized the right of access to courts as follows:

> The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges...Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. (Citations omitted) 207 U.S. at 148.

As previously stated, the right to the access of courts is

not to be treated as a mere formal right but requires all courts to provide access that is deemed to be adequate, effective and meaningful. *Ryland*, 708 F.2d at 972, *citing*, *Bounds v. Smith*, 430 U.S. 817 (1977); *see also*, *Rudolph v. Locke*, 594 F.2d 1076, 1078 (5th Cir. 1979). The present case shows that the lower court found *for* Pinellas on all of the contract claims which have now been excluded. (A:V) Hill appealed the trial court's ruling. Pursuant to the Florida Rules of Appellate Procedure, Hill identified in its Brief those particular items it was appealing. Rule 9.210, Fla.R.App.P., requires that counsel be vigilant in specifying in the brief for the court the alleged errors committed. In the Initial Appellant's Brief filed by Hill, it did *not* request review by the District Court of the numerous well-pled contract actions of Pinellas. Rather, Hill only requested review of three fact issues which the District Court returned for a new trial. (A:W) The multiple breach of contract claims which are now the subject of this petition were *clearly* not presented to the District Court on the first appeal. Additionally, because of the recusal of the trial judge and the remand for a new trial on the issues not resolved by the appellate court, Pinellas should have had the opportunity to again raise all of its multiple breach of contract issues. Once the judge was ruled to have been recused, the District Court could not reach *any* of the issues it ruled upon including the contract claims it decided as a matter of law. As a result of the recusal of the trial judge, the final judgment was necessarily vacated and a new trial was required. The parties were returned to their original position as far as the allegations in the pending complaint are concerned.

However, when the case was returned to the lower court the new trial judge agreed with Hill's position that the multiple breach of contract claims had been dismissed by the District Court pursuant to its Opinion. *CH2M Hill Southeast, Inc.*, 598 So.2d 85. (A:G) A review of this decision permits elimination of other contract issues only by inference and not even by implication.

Despite the obvious importance that this Court has

acknowledged to lie with the right to the access of courts and the opportunity to be heard, the District Court was determined to wipe out multiple breach of contract claims properly alleged on behalf of Pinellas without ever giving Pinellas the opportunity to be heard on these claims on the *merits*. Motions to Dismiss and objections to these claims had already been denied. (A:I,J,K,L,N,O) The resolution of whether the action taken by the state judiciary in this matter needs to be addressed by this Court. The Florida state judiciary has, without notice to Pinellas, "wiped out" all of its breach of contract claims. Pinellas has never been given an opportunity to argue the validity of its claims. To uphold the decision of the District Court, is to confirm that we no longer have a true system of justice.

Interpace represented the life of the pipeline to be in excess of 100 years when buried in a natural soil environment. Even the lower court's decision, which was later reversed for other reasons, *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So.2d 85, found that the pipe was not properly manufactured and would not last 100 years or more as represented. (A:V:7-9) Interpace prestressed pipe is and was blowing up all over the country. The first rupture of an Interpace pipeline with Class IV wire was in Michigan in 1975. The Federal Circuit Court of Appeals has confirmed this fact as well. *See City of Richmond v. Madison Management Group*, 918 F.2d 438 (4th Cir. 1990). The reduction in materials including the wire which wraps the pipe (prestressing), the cylinder and the aggregate was done knowingly and deliberately by Interpace which tremendously reduced the strength of the pipe. This reduction should have been caught by Hill and an entire defective pipeline prevented from being placed into public service. (A:H:17-31)

This case is also of importance due to the public's need for dependable water service uninterrupted by the blowing up of pipes throughout Pinellas' 13.5 mile pipeline on a constant intermittent basis causing water shortages and water rationing. There is serious danger in the rupture of one pipe as it could cause the entire system to fail and cause backflow by pulling sep-

tic tanks and other contaminants into the water supply. "Backflow" occurs when the water system is not able to supply the required water to a given area thereby causing a negative pressure to occur in the water distribution lines. This negative pressure draws water into the water distribution lines and ultimately into the water transmission lines and contamination from septic tanks, toilets and other pollution, etc. occurs. "Backflow" creates a substantial health hazard. Under such a threat, it is clear that the *public interest* requires that the line in question be dependable and reliable. The public's right to have its claims of improper engineering must be restored by this Court.

III. The Decision Of The District Court Is Constitutionally Erroneous.

This Court's interpretation that the right to sue and defend in the courts across this county lies at the heart of an orderly judicial system, has been completely disavowed by the District Court. *Chambers*, 207 U.S. 142, at 148 (1907). The District Court cannot purport to have conducted a fact finding mission during the first appellate action because this would impermissibly usurp the role of the trial judge and/or jury. *See Prevatt v. Prevatt*, 462 So.2d 604 (Fla. 2d DCA 1985); *Williams, M.D. v. Dolphin Reef, Ltd.*, 455 So.2d 640 (Fla. 2d DCA 1984). The District Court has taken facts yet to be determined or even raised before the appellate court and decided to take those well-pled facts and allegations *away* with no legal justification. Despite all of this, when the matter came back to the District Court it held that it did indeed purport to conduct a fact finding mission and did indeed resolve the well-pled breach of contract issues without those issues having ever been briefed or presented to the appellate court in the first appeal. Pinellas never had notice that its unappealed contract claims were in jeopardy on the first appeal. This is why Pinellas has never been heard with its rights summarily eliminated.

The question that must be asked is whether the appellate courts can decide factual issues on appeal that are never pre-

sented by the parties involved in the appeal. Additional confusion is only added when the action is remanded for a new trial because the previous trial judge is recused. The appellate court cannot recuse a trial judge and proceed to resolve issues of fact or law.

It is impossible to understand how the multiple breach of contract allegations could be disposed of by the District Court if such actions are not brought to the court's attention. To the contrary, the law set forth in Florida (and in the federal courts) holds that the law of the case doctrine can only apply to those issues that were actually considered and decided on a former appeal involving the same action. *See Two M Development Corp. v. Mikos*, 578 So.2d 829 (Fla. 2d DCA 1991); *Greene v. Massey*, 384 So.2d 24 (Fla. 1980). *See also, Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); and *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982), *cert.den.*, 459 U.S. 1226 (1983). On remand for new trial, only those issues actually appealed and considered are resolved with finality. *See Tri Par Land Development Corp. v. Henthorn*, 241 So.2d 429 (Fla. 2d DCA 1970); *Sax Enterprises, Inc. v. David and Dash, Inc.*, 107 So.2d 612 (Fla. 1958). Lastly, if no appeal is taken on one point but the case is appealed on another, then the first point becomes the law of the case and upon a reversal, that law of the case remains as correct and cannot be revisited. The application of this principal absent recusal would have required affirmance of the judgment against Hill. *See Marine Midland Bank Central v. Cote*, 384 So.2d 658 (Fla. 5th DCA 1980); *Tillman v. Smith*, 560 So.2d 344 (Fla. 5th DCA 1990). *See also, Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, *cert. den.*, 96 S.Ct. 1725, 425 U.S. 950, 48 L.Ed.2d 194, *on remand* 465 F.Supp. 478.

The District Court, by ignoring the federal issues raised by Pinellas in the prior state court proceeding, was able to summarily dismiss Pinellas' constitutional right to the access of courts and the opportunity to be heard on the merits. The facade

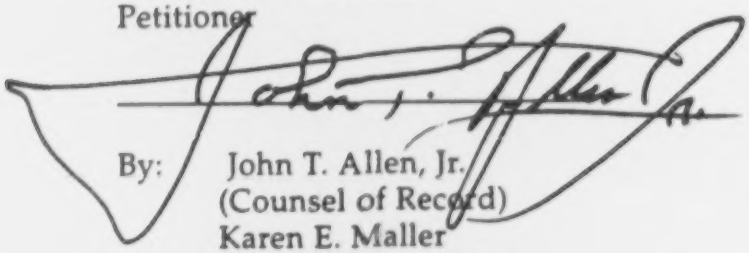
that Pinellas has in fact been given an opportunity to raise the issues before the court in state court litigation is grossly misleading. The bottom line is that a review of the events that have taken place in the Florida court system evidences that Pinellas has never been provided the opportunity to do anything other than to plead numerous breach of contract claims. Pinellas was never given any further right to have these issues raised, heard, or tried by a Florida court.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted and the appropriate order be given to summarily dispose of the opinion of the District Court in and for the State of Florida on the merits, and also the decision of the Circuit Court of the Sixth Judicial Circuit in and for Pinellas, Florida.

Respectfully submitted,

PINELLAS, FLORIDA
Petitioner



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